Supreme Court, U.S.
FILED
931477 MAR 14 1994
OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

MICHAEL O. TATUM,
Petitioner,

vs.

PHILIP MORRIS INCORPORATED,
doing business as Philip Morris USA,
a foreign corporation,
PHILIP MORRIS MANAGEMENT CORPORATION,
a foreign corporation,
and RALPH RAYBURN,
sued in both his individual and
representative capacities,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 14, 1994

56 pp

QUESTIONS PRESENTED FOR REVIEW

May a Court deny a Plaintiff's Seventh Amendment right to a jury trial to decide all facts common between a federal law-based equitable claim and pendent state law legal claims by first trying the federal law-based claim at a bench trial, reserving ruling on a pending Motion for Summary Judgment on the legal claims until after the bench trial, and then decide the pending Motion for Summary Judgment based on the Court's decision on the federal law-based equitable claim?

May a Court, in deciding a Motion for Summary Judgment on pendent state law legal claims after a bench trial on a federal law-based equitable claim, ignore evidentiary matters presented in the bench trial and apply the Court's credibility determinations made during the bench trial as to witness testimony in deciding the pending Motion for Summary Judgment on pendent state law legal claims?

PARTIES

The caption contains all of the parties to the proceedings before the Unites States Court of Appeals for the Tenth Circuit and the United States District Court for the Western District of Oklahoma.

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Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Michael O. Tatum respectfully prays that a Writ of Certiorari be issued to review the December 14, 1993, Order and Judgment of

the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit entered on December 14, 1993, is reprinted as Appendix "A" hereto.

The Judgment of the United States District Court for the Western District of Oklahoma entered on December 10, 1992, is reprinted as Appendix "C" hereto.

JURISDICTION

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit was entered on December 14, 1993. This Petition for Writ of Certiorari was filed within ninety (90) days of the Order and Judgment of the United States Court of Appeals for the Tenth Circuit pursuant to Rule 13.1 of the Rules of the Supreme Court. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

The original action filed in the United States District Court for the Western District of Oklahoma was for sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq., and interrelated pendent state law claims, including wrongful discharge in violation of public policy, tortious interference with contract, employment, and economic relations, defamation, intentional

infliction of emotional distress, respondeat superior, and negligent retention, all for which Plaintiff timely demanded a jury trial. Jurisdiction of the District Court was based on 28 U.S.C. §1331, 1343(a)(4), and 1367, and 42 U.S.C. §2000e-5(f). The Judgment of the United States District Court for the Western District of Oklahoma entered on December 10, 1992, was a final order appealable of right pursuant to 28 U.S.C. §1291. The initial appeal was perfected in accordance with Rule 4(a), F.R.A.P.

STATUTES AND CONSTITUTIONAL PROVISIONS

The following provisions of the United States Constitution and federal and state statutes are involved in the questions presented by this Petition for Writ of Certiorari.

CONSTITUTION OF THE UNITED STATES
Amendment 7:

Trial by jury in civil cases.

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Rule 38
Federal Rules of Civil Procedure:

Jury trial of right

> (a) Right preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Rule 39
Federal Rules of Civil Procedure:

Trial by jury or by the Court

(a) By jury. When trial by jury has been demanded as provided for in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury, or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

STATEMENT OF THE CASE

The Petitioner is Michael O. Tatum, a male citizen of the United States and resident of the State of Oklahoma.

Tatum was employed by the Defendants for approximately five years and had a better than average work record.

Tatum was terminated from his employment on an allegation of theft of a bottle of wine from a company-sponsored reception.

Tatum filed a combination Title VII and state law tort action in the United States District Court for the Western District of Oklahoma, timely demanding a jury trial, alleging that his termination was prompted by the Defendants' desire to replace male employees in Tatum's position and other similar positions with attractive female employees.

The District Court scheduled this action on the Court's docket as a jury

trial.

At the end of discovery, the Defendants filed a Motion for Summary Judgment on all of Tatum's claims.

On the eve of the scheduled jury trial, the District Court entered a Bifurcation Order and severed Tatum's Title VII claim from his pendent state law legal claims.

At the oral argument on the Defendants' Motion for Summary Judgment, the Trial Court deferred ruling on the Motion until after the Court had tried Tatum's Title VII claim.

Over Tatum's objection, the District Court proceeded to try the Title VII claim at a bench trial. During the course of the bench trial, the Defendants reurged their Motion for Summary Judgment several times. Each time, the Court deferred ruling on the Motion and took the reurged Motion under advisement.

Both sides made a full evidentiary presentation to the Court. Tatum presented evidence and witnesses that he did not steal the bottle of wine, that the manager had been strongly encouraged by his managers to recruit and hire females, that the Defendants' witnesses presented implausible versions of the incident which the Defendants knew or should have known were implausible, that relevant evidence was suppressed by the Defendants during their investigation, that the Defendants investigation was inadequate, and that the Defendants' witnesses had biases which brought their credibility into question.

At the conclusion of the bench trial, the Court orally ruled that Tatum had failed to carry his burden of showing discrimination. Shortly thereafter, the Court granted the pending Motion for Summary Judgment on Tatum's pendent interrelated state law legal claims. In

granting Summary Judgment to the Defendants, the Court expressly discounted any reliance on the prior bench proceedings, noting that its "grant of summary judgment is based solely on the evidence presented by the motion, briefs and exhibits presented by the parties to the motion." The Court then entered Judgment on all of Tatum's claims.

Tatum appealed the Judgment entered by the District Court.

The Court of Appeals for the Tenth Circuit affirmed the Title VII decision and the Trial Court's entry of Summary Judgment on Tatum's interrelated pendent state law legal claims.

It is from this latter holding that Tatum seeks review via a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The reasons for granting review of the District Court and Court of Appeals for the Tenth Circuit are as follows:

1. By the Order and Judgment of the Circuit Court of Appeals for the Tenth Circuit, there is a split of opinion between this decision of the Tenth Circuit and prior decisions of the Tenth Circuit, other Circuit Courts of Appeal, and this Court.

In the Order and Judgment, the Tenth Circuit stated:

> [W]hile we recognize that such claims generally must be tried to a jury before overlapping equitable claims are tried to the bench, see Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1443 (10th Cir. 1988), we need not decide whether this rule, developed in cases where the legal claims possessed independent federal jurisdictional bases, should be suspended where, as here, the legal claims are cognizable in federal court only through pendent jurisdiction. In the former context, the legal claims would still have to be decided

> on the merits whatever the resolution of the equitable claim, while in the latter context, pendent jurisdiction over the legal claims could always be declined if the equitable claim proved unsuccessful. Thus, it was at least arguably proper for the district court to set the equitable claim for hearing first, given that its disposition could obviate consideration of the legal claims should the district thereafter find the continued exercise of pendent jurisdiction unwarranted.

By so ruling, the Tenth Circuit appears to have carved an exception to the Seventh Amendment not present in prior decisions of the Tenth Circuit, other Circuit Courts, and this Court.

In Butler v. Pollard, 800 F.2d 223 (10th Cir. 1986) the Tenth Circuit stated:

> When legal and equitable claims are tried together, common questions of fact must be decided by the jury in order to preserve the integrity of the seventh amendment. Beacon Theaters v. Westover, 359 U.S. 500, 510-11, 79 S. Ct. 948, 956-57, 3 L.Ed.2d 988 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 472-73, 82 S. Ct. 894, 896-

97, 8 L.Ed.2d 44 (1962); Heyman, 456 F.2d at 130. (Referring to Heyman v. Kline, 456 F.2d 123, 130-31 (2d Cir.), cert.denied, 409 U.S. 847, 93 S. Ct. 53, 34 L.Ed.2d 88 (1972).

In Tull v. United States, 481 US 412, 95 L.Ed.2d 365, 107 S. Ct. 1831 (1987), the Federal Government sued a real-estate developer in the United States District Court for the Eastern District of Virginia for dumping fill on wetlands without a permit, in violation of the Clean Water Act. The Government sought both injunctive relief and civil penalties. The developer timely demanded a jury trial but was denied by the District Court. The United States Court of Appeals for the Fourth Circuit rejected the developers argument that he was entitled to a jury trial under the Seventh Amendment and affirmed the District Court. On certiorari, this Court reversed and remanded stating:

In such a situation, if a "legal

> claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought." Curtis v Loether, 415 U.S., at 196, n.11, 39 L.Ed.2d 260, 94 S. Ct. 1005. Thus, petitioner has a constitutional right to a jury trial to determine his liability on the legal claims.

In Lytle v. Household Mfg., Inc., 110 S. Ct. 1331 (1990) this Court stated:

> Our conclusion is consistent with this Court's approach in cases involving a wrongful denial of a petitioner's right to a jury trial on legal issues. In such cases, we have never accorded collateral-estoppel effect to the trial court's factual determinations. Instead we have reversed and remanded each case in its entirety for a trial before a jury. See Meeker v. Ambassador Oil Corp., 375 U.S. 160, 84 S. Ct. 273, 11 L.Ed.2d 261 (1963) (per curiam) (reversing trial court's decision to try equitable claims first and thereby to bar jury trial on legal claims that relied on the same facts); Tull v. United States, 481 U.S. 412, 107 S. Ct. 1831, 95 L.Ed.2d 365 (1987) (reversing and remanding claims for monetary penalties

and injunctive relief because trial court improperly denied plaintiff a jury trial on the claims for monetary penalties); Granfinanciera, S.A. v. Nordberg, 492 U.S. _____, 109 S. Ct. 2782, 106 L.Ed.2d 26 (1989) (reversing and remanding bankruptcy court's judgment because petitioners were denied a jury trial and according no weight to trial judge's factual findings). Id. 110 S. Ct. at 1337.

When legal and equitable claims are joined in the same action, "the right to jury trial on the legal claim, including all issues common to both claims, remains intact." Curtis v. Loether, 415 U.S. 189, 196 n.11, 94 S. Ct. 1005, 1009, n.11, 39 L.Ed.2d 260 (1974). Further, had the § 1981 claims remained in the suit, a jury would have been required to resolve those claims before the court considered the Title VII claims, because "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 510 - 511, 79 S. Ct. 948, 956-957, 3 L.Ed.2d 988 (1959) (footnote omitted). Accord Dairy Queen, Inc. v. Wood, 369 U.S. 469, 473, 82 S.

Ct. 894, 897, 8 L.Ed.2d 44 (1962). The Court in Beacon Theaters emphasized the importance of the order in which legal and equitable claims joined in one suit would be resolved because it "thought that if an issue common to both legal and equitable claims was first determined by a judge, relitigation of the issue before a jury might be foreclosed by res judicata or collateral estoppel". Parklane Hosiery Co., 439 U.S., at 334, 99 S. Ct., at 653. Id. 110 S. Ct. at 1335-36.

As we have long recognized, a jury and a judge can draw different conclusions from the same evidence. See, e.g., Sioux City & Pacific Railroad Co. v. Stout, 17 Wall. 657, 664, 21 L.Ed. 745 (1874). Id. 110 S. Ct. at 1338.

Vacating the District Court's determination regarding Lytle's Title VII claims is required to afford Lytle complete and consistent relief. Had his § 1981 claims not been dismissed, the jury's determination of legal and factual issues could not have been disregarded when the District Court considered his equitable claims. Moreover, vacating the District Court's judgment avoids the possibility of inconsistent determinations. See Montana v. United States, 440 U.S. 147, 154, 99 S. Ct. 970, 974, 59 L.Ed.2d 210 (1979)

> (noting that inconsistent decisions pose threat of diminishing reliance on the judiciary). Id. 110 S. Ct. at 1338 n.4.

2. By the Order and Judgment of the Circuit Court of Appeals for the Tenth Circuit, the Tenth Circuit has sanctioned the District Court's departure from the accepted and usual course of judicial proceedings which calls for an exercise of this Court's power of supervision.

In its Bifurcation Order, the District Court stated:

> A review of the file in this case reveals that Plaintiff Michael Tatum has claims against Defendants pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., for gender-based discrimination. Under Title VII, only equitable relief is available to Plaintiff, thus Plaintiff is precluded from presenting his Title VII claims to a jury. The court therefore deems it appropriate to bifurcate this case under Fed. R. Civ. P. 42 (b). The non-jury portion of this case will be tried to the court on November 9, 1992, and the remaining issues for which a jury trial is

available will be tried at a later date.

By this Bifurcation Order, the District Court violated Tatum's Seventh Amendment right to a jury trial and to have the jury decide the facts common between his federal equitable claim and his pendent state law legal claims.

Most noticeable of these is Tatum's claim that the actions of the Defendants was in violation of the public policy of the State of Oklahoma. Tatum's public policy tort cause of action parallels his Title VII cause of action for his discharge under Tate v. Browning-Ferris, Inc., 833 P.2d 1218 (Okla. 1992). Both claims are based upon the same operative facts and require determination of those facts by a jury with the jury's decision on those facts binding on the Trial Court. Skinner v. Total Petroleum, Inc., 859 F.2d 1439 (10th Cir. 1988).

The Tenth Circuit's affirmance of

this violation perpetuates not only the District Court's denial of Tatum's Seventh Amendment right to a jury trial, but imposes on Tatum the District Court's credibility determinations as to witness veracity from the Title VII bench trial to the Trial Court's determination of Tatum's interrelated pendent state law legal claims.

CONCLUSION

For the foregoing reasons, Petitioner asks this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted this 14th day of March, 1994.



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument was mailed, postage prepaid, this 14th day of March, 1994, to:

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APPENDIX

A. Order and Judgment of the United States Court of Appeals for the Tenth Circuit A-1

B. Notice of Appeal B-1

C. Judgment of the United States District Court for the Western District of Oklahoma C-1

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MICHAEL O. TATUM, Plaintiff-Appellant, v. PHILIP MORRIS INCORPORATED, doing business as Philip Morris USA, a foreign corporation; PHILIP MORRIS MANAGEMENT CORPORATION, a foreign corporation; RALPH RAYBURN, sued in both his individual and representative capacities, Defendants-Appellees.	)	No. 93-6018 (D.C. No. CIV-90-1485-B) (W.D. Okla.)

ORDER AND JUDGMENT*

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Before ANDERSON and EBEL, Circuit Judges, and WINDER,** District Judge.

**Honorable David K. Winder, Chief Judge, United States District Court for the District of Utah, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff appeals from an adverse judgment entered by the district court in this combination Title VII/state tort action. Plaintiff was discharged from his employment with defendant Philip Morris, Inc. (PMI) for allegedly stealing a bottle of wine at a company reception. PMI subsequently selected a female to fill the position vacated by plaintiff. Alleging

that the wine incident was merely a false pretext to replace him with an attractive (though less qualified) woman, plaintiff brought suit for sex discrimination under Title VII. In addition, plaintiff asserted several pendent state law claims, including wrongful discharge in violation of public policy, tortious interference with contract, employment, and economic relations, defamation, intentional infliction of emotional distress, respondeat superior, and negligent retention, all for which he timely demanded a jury trial.

The district court bifurcated the action and, over plaintiff's objection, tried the Title VII claim first. At the conclusion of the bench trial, the district court held that plaintiff had failed to carry his burden of showing discrimination. Shortly thereafter, the district court granted defendants' pending

motion for summary judgment on the remaining claims. On appeal, plaintiff argues: (1) the procedure employed by the district court deprived him of his right to a jury trial on the state tort claims; (2) contested issues of fact should have precluded summary judgment on those claims; (3) he was denied proper discovery; and (4) the district judge should have recused himself for bias. We affirm the judgment of the district court for the reasons to follow.

We need not pause long over the first issue raised by plaintiff. Regardless of the Title VII determination, if the district court correctly granted summary judgment on the pendent state law claims, the procedural handling of the case could not have had any impact on plaintiff's right to a jury trial. In short, the proper pretrial disposition of plaintiff's legal claims rendered the jury trial issue

moot. See Plaisance v. Phelps, 845 F.2d 107, 108 (5th Cir. 1988); B & L Sales Assocs. v. H. Daroff & Sons, Inc., 421 F.2d 352, 354 (2d Cir.), cert. denied, 398 U.S. 952 (1970). Consequently, while we recognize that such claims generally must be tried to a jury before overlapping equitable claims are tried to the bench, see Skinner v. Total Petroleum, Inc., 859 F.2d 1439, 1443 (10th Cir. 1988), we need not decide whether this rule, developed in cases where the legal claims possessed independent federal jurisdictional bases, should be suspended where, as here, the legal claims are cognizable in federal court only through pendent jurisdiction. In the former context, the legal claims would still have to be decided on the merits whatever the resolution of the equitable claim, while in the latter context, pendent jurisdiction over the legal claims could always be declined if

the equitable claim proved unsuccessful. Thus, it was at least arguably proper for the district court to set the equitable claim for hearing first, given that its disposition could obviate consideration of the legal claims should the district thereafter find the continued exercise of pendent jurisdiction unwarranted.[1]

We turn now to the claims disposed of on summary judgment. This court recently summarized our standard of review for summary judgment on state law issues as follows:

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[1] Indeed, plaintiff argues at one point that if the district court did not err in deciding the Title VII claim first, the remaining claims should have been dismissed without prejudice for lack of jurisdiction. See Reply Brief of Appellant at 5-6. We note, however, that such a ruling is discretionary, and, given the relatively late stage in the proceedings at which the Title VII claim was resolved, we cannot say the district court abused its discretion in retaining jurisdiction over the remaining, interrelated state law claims. See Thatcher Enters. v. Cache County Corp., 902 F.2d 1472, 1478 (10th Cir. 1990).

> We review summary judgment de novo and apply the same legal standard used by the district court under Fed. R. Civ. P. 56(c). Summary Judgment is appropriate if there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law. We view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. [Oklahoma] law governs [the state law claims], and in the absence of state cases on point we will look to other state courts as well as federal decisions. We review de novo the district court's application of [Oklahoma] law.

Green Constr. Co. v. Kansas Power & Light Co., 1 F.3d 1005, 1008 (10th Cir. 1993) (citations and internal quotations omitted). We note that in keeping with the particular procedural circumstances surrounding its Rule 56 determination, the district court expressly discounted any reliance on the prior bench proceedings, noting that its "grant of summary judgment is based solely on the evidence presented

by the motion, briefs and exhibits presented by the parties to the motion." App. Vol. I at 98.

Although plaintiff generally objects to the grant of summary judgment on all of his state tort claims, his appellate briefs contain no argument relating specifically to his claims for intentional infliction of emotional distress and respondeat superior. Accordingly, we do not address the propriety of summary judgment with respect to those claims. See Culver v. Town of Torrington, 930 F.2d 1456, 1461 (10th Cir. 1991) (issue not argued in appellate brief is waived). Furthermore, as to the negligent retention claim, plaintiff's complaint that defendants "did not address this issue except in a last minute footnote of their brief without citation to authority or to fact," Opening Brief of Appellant at 39, is not an objection to the substance of

the district court's ruling thereon, and his perfunctory, unsupported conclusion that summary judgment "should have been denied," id., is not adequate appellate argument, see Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1024-25 (10th Cir.) (to challenge summary judgment, nonmovant must identify sufficient contrary evidence in record; absent such specific reference, we will not search the record to determine whether there exists evidence which might require submission of case to jury), cert. denied, 113 S. Ct. 635 (1992); see also United States v. Zannino, 895 F.2d 1, 17 (1st Cir.) (applying "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived"), cert. denied, 494 U.S. 1082 (1990).

We begin our substantive review of

summary judgment, then, with plaintiff's claim for wrongful discharge in violation of the public policy against invidious discrimination. See generally Tate v. Browning-Ferris, Inc., 833 P.2d 1218 (Okla. 1992); Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989). As plaintiff acknowledges, see Reply Brief of Appellant at 4, this "public policy tort" essentially parallels or incorporates plaintiff's sex discrimination claim under Title VII. See Sanchez v. Philip Morris, Inc., 992 F.2d 244, 248 (10th Cir. 1993) ("Oklahoma recognizes a separate public policy tort claim for plaintiffs alleging facts sufficient to state a claim that they were wrongfully discharged in violation of, inter alia, Title VII"). The district court rejected the claim because:

> while Plaintiff states that he did not take the bottle of wine, he has provided no evidence that representatives of Philip Morris

> did not believe that he stole the bottle of wine at the time he was terminated and has produced no evidence that his termination was for any acts other than his acts of theft and insubordination.
>
> Defendants, on the other hand, have produced specific evidence which Plaintiff failed to dispute that his employment was terminated only because of his dishonesty for stealing the bottle of wine and for insubordination. . . .
>
> . . . .
>
> The court finds that there is no genuine issue as to any material fact that precludes Defendants from obtaining summary judgment on Plaintiff's claim that Defendants violated the public policy of Oklahoma. The court finds that the undisputed evidence presented to the court establishes that . . . gender played no part in the decision to terminate [plaintiff's] employment [and] . . . that Defendants believed Plaintiff stole the bottle of wine and terminated his employment based only upon that belief.

App. Vol. I at 106-08. Recast in the traditional terminology of employment discrimination jurisprudence, the district

court's holding was that plaintiff had failed to rebut, as mere pretext for sex discrimination, the legitimate reason given for his discharge.[2]

Defendants presented substantial evidence that plaintiff was fired for dishonesty and insubordination based on his alleged theft of the bottle of wine after he specifically was told by his superiors not to take it. Defendants relied on several eyewitness accounts of the incident in arriving at their decision

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[2] It is appropriate to use the burden-shifting formulation established for assessment of federal employment discrimination actions in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to analyze plaintiff's public policy tort claim. See, e.g., Erickson v. Marsh & McLennan Co., 545 A.2d 812, 815 & n.1 (N.J. Super. 1988), aff'd in pertinent part, rev'd in part on other grounds, 569 A.2d 793, 798-99 (N.J. 1990); Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569, 571-72 (Minn. 1987); cf. Buckner v. General Motors Corp., 760 P.2d 803, 806-07 (Okla. 1988) (claim under retaliatory discharge provision of state workers' compensation act analyzed under federal formulation).

to terminate plaintiff. On appeal, plaintiff argues that the accuracy of these accounts is disputed by his own testimony and that of two of his witnesses. However, the materials cited by plaintiff indicate that the latter witnesses never came forward during his investigation and termination by defendants. At that time, defendants were confronted with concerted eyewitness accusations of Plaintiff's theft -- bolstered by his earlier expressions of interest in the object stolen -- that were countered only by plaintiff's self-serving denial of wrongdoing. Under the circumstances, plaintiff's termination simply does not raise a triable inference of discrimination. Even if plaintiff's witnesses were correct, the only conclusion permitted on our record is that defendants reasonably (if erroneously) determined plaintiff was guilty of

dishonesty and insubordination and fired him accordingly. The exercise of such business judgment does not provide a basis for a finding of pretext and, thus, discrimination.[3] Cf. Fallis v. Kerr-McGee Corp., 944 F.2d 743, 747 (10th Cir. 1991); Branson v. Price River Coal Co., 853 F.2d 768, 772 (10th Cir. 1988). Furthermore, we concur in the district court's negative assessment of the evidence through which plaintiff sought to prove discriminatory intent more directly. See, inter alia, App. Vol. I at 104-09.

Plaintiff's claim for interference with contract, employment, and economic relations is based on defendants' communication of his termination, and the

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[3] We note plaintiff does not argue that other PMI employees, particularly women, were retained despite comparable transgressions, so this case does not involve the complication of disparity in discipline discussed in EEOC v. Flasher Co., 986 F.2d 1312, 1319-22 (10th Cir. 1992).

reasons therefor, to PMI's customers, particularly those whom plaintiff characterizes as potential employers. While the district court rejected this claim for a number of reasons, we need only note our agreement with its holding that plaintiff failed to establish any protected interest or relationship with which defendants interfered.

The first element of a cause of action for tortious interference is the existence of a contractual or business relationship, see Ellison v. An-Son Corp., 751 P.2d 1102, 1106 (Okla. Ct. App. 1987); cf. Haynes v. South Community Hosp. Management, Inc., 793 P.2d 303, 306-07 (Okla. Ct. App. 1990); Del State Bank v. Salmon, 548 P.2d 1024, 1025-28 (Okla. 1976), and plaintiff simply has not shown one. While Oklahoma also recognizes a related theory of interference with prospective economic advantage, see

Overbeck v. Quaker Life Ins. Co., 757 P.2d 846, 847-48 (Okla. Ct. App. 1984) (whereas interference with contract involves loss of existing property right, interference with prospective economic advantage involves loss of reasonable expectation of profit), such a claim requires the plaintiff to "show either that prospective economic advantage would have been achieved had it not been for such interference or that there was, in view of all the circumstances, a reasonable assurance thereof," Crystal Gas Co. v. Oklahoma Natural Gas Co., 529 P.2d 987, 990 (Okla. 1974) (quoting 45 Am. Jur. 2d, Interference § 6 (1984) (emphasis added). As in Crystal Gas, there is insufficient evidence cited to support an inference that plaintiff would have achieved profitable economic relations, i.e., obtained employment, but for defendants' conduct.

That leaves plaintiff's state law claim for defamation, based on defendant's publication of the reason for his discharge. The district court rejected this claim for several reasons. Again, we need consider only one of these.

We agree with the district court's determination that defendants had a conditional privilege under Oklahoma law to inform interested parties, including customers and employees, of the fact and circumstances of plaintiff's termination. See M. F. Patterson Dental Supply Co. v. Wadley, 401 F.2d 167, 170-71 (10th Cir. 1968). See generally, Fawcett Publications, Inc. v. Morris, 377 P.2d 42, 52 (Okla. 1962) (discussing common law conditional privilege doctrine), cert. denied, 376 U.S. 513 (1964). With that legal determination, whatever malice may have been presumed in law from defendants' accusation of theft was negated, leaving

it plaintiff's burden to show such actual malice on the part of defendants as would defeat the privilege. See Reininger v. Prickett, 137 P.2d 595, 598 (Okla. 1943); Meistrell v. McPhail, 788 P.2d 1387, 1388 (Okla. Ct. App. 1989). The district court held plaintiff had not demonstrated a triable issue in this regard. See Meistrell, 788 P.2d at 512 (affirming summary judgment where plaintiff did not point to any evidence of malice); cf. Reininger, 137 P.2d at 598 (affirming directed verdict for defendant because of lack of evidence sufficient to establish prima facie case of malice). Plaintiff, whose only mention of the matter on appeal consists of a citation to Wadley for the general proposition that malice is a factual issue for the jury, does not point to anything in the record to challenge the district court's holding that the facts did not warrant submission to the jury.

We can only conclude the issue was properly resolved in defendants' favor. See Thomas, 968 F.2d at 1024-25.

Turning now to other matters, Plaintiff objects to the denial of his request for a continuance to conduct immediate discovery regarding a belatedly produced advertisement for his position run by an agency retained by PMI. Specifically, plaintiff wished to halt the proceedings until he deposed someone from the agency who could relate the qualifications and characteristics, if any, PMI wanted included in the ad. Given the procedural circumstances, the untaken opportunity to pursue pertinent discovery in a timely manner,[4] and the facially

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[4] Defendants point out that long before this case came on for disposition, plaintiff's counsel was given documents indicating PMI had sought applicants for plaintiff's position from the agency that ran the ad. See App. Vol. III at 385-86. Thus, counsel had at least five months, from the reopening of discovery in June of 1992 until November of 1992, to question

unprobative nature of the advertisement itself, we cannot say the district court abused its discretion in denying plaintiff's request for eleventh-hour discovery. See generally, Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1522 (10th Cir. 1992); Sil-Flo, Inc. v. SFHC, Inc., 917 F.2d 1507, 1514 (10th Cir. 1990).

Finally, plaintiff raises the spectre of judicial bias, based on certain adverse rulings and the district court's informal expression of skepticism regarding the persuasiveness of plaintiff's reverse sex discrimination case. Neither of these is a sufficient basis to compel the recusal of a trial judge. See Green v. Dorrel, 969 F.2d 915, 919 (10th Cir. 1992) (adverse rulings do not provide adequate

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the agency's personnel regarding pertinent instructions PMI may have related concerning the substitute sought for plaintiff.

grounds for disqualification), cert. denied, 113 S. Ct. 1336 (1993); United States v. Page, 828 F.2d 1476, 1481 (10th Cir.) (unfavorable opinion of case's merit does not provide basis for disqualification unless derived from extrajudicial sources), cert. denied, 484 U.S. 989 (1987). Furthermore, plaintiff fails to allege facts sufficient to suggest the "pervasive bias and prejudice" necessary to warrant recusal on the basis on attitudes developed during the course of the judicial proceeding. See Page, 828 F.2d at 1481.

The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

Entered for the Court

David M. Ebel
Circuit Judge

IN THE UNITED STATES DISTRICT COUNT

FOR THE WESTERN DISTRICT OF OKLAHOMA

MICHAEL O. TATUM, Plaintiff, v. PHILIP MORRIS INCORPORATED, a foreign corporation and d/b/a Philip Morris USA, PHILIP MORRIS MANAGEMENT CORPORATION, a foreign corporation; and RALPH RAYBURN, sued in both his individual and representative capacities, Defendants.	)	CIV-90-1485-B

NOTICE OF APPEAL

Notice is hereby given that Michael O. Tatum, Plaintiff, in the above entitled and numbered action, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Judgment entered 12/10/93.

Respectfully submitted,

/s/ Frederick W. Southern, jr.

Frederick W. Southern, jr.,
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(405) 236-3701 (Fax 239-6825)

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument was mailed, postage prepaid, this 11th day of January, 1993, to:

Elizabeth Scott Wood, OBA # 8022
Robert W. Dace, OBA # 10236
M. Richard Mullins, OBA # 13329
McAfee & Taft,
a Professional Corporation
Tenth Floor, Two Leadership Square
211 North Robinson
Oklahoma City, Oklahoma 73102
(405) 235-9621 (Fax 235-0439)

/s/ Frederick W. Southern, jr.

Frederick W. Southern, jr.
Attorney for the Plaintiff

IN THE UNITED STATES DISTRICT COUNT

FOR THE WESTERN DISTRICT OF OKLAHOMA

MICHAEL O. TATUM, Plaintiff, v. PHILIP MORRIS INCORPORATED, a foreign corporation and d/b/a Philip Morris USA, PHILIP MORRIS MANAGEMENT CORPORATION, a foreign corporation; and RALPH RAYBURN, sued in his individual and representative capacities, Defendants.	)	CIV-90-1485-B

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law and the Order Granting Defendant's Motion for Summary Judgment each entered herein this day, the court enters judgment in favor of Defendants, Philip Morris Incorporated, a foreign corporation, and d/b/a Philip Morris USA, Philip Morris Management Corp., a foreign

corporation, and Ralph Rayburn, sued in both his individual and representative capacities, and against Plaintiff, Michael O. Tatum.

Accordingly, the case is dismissed with prejudice.

IT IS SO ORDERED.

Dated this 10th day of December, 1992.

/s/ LUTHER BOHANON
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON
12/10/92

D-1

IN THE UNITED STATES DISTRICT COUNT

FOR THE WESTERN DISTRICT OF OKLAHOMA

MICHAEL O. TATUM, Plaintiff, v. PHILIP MORRIS INCORPORATED, a foreign corporation and d/b/a PHILIP MORRIS USA, PHILIP MORRIS MANAGEMENT CORP., a foreign corporation, and RALPH RAYBURN, sued in his individual and representative capacities, Defendants.	)	CIV-90-1485-B

BIFURCATION ORDER

A review of the file in this case reveals that Plaintiff Michael Tatum has claims against Defendants pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., for gender-based discrimination. Under Title VII, only equitable relief is available to Plaintiff, thus Plaintiff is precluded

from presenting his Title VII claims to a jury. The court therefore deems it appropriate to bifurcate this case under Fed. R. Civ. P. 42 (b). The non-jury portion of this case will be tried to the court on November 9, 1992, and the remaining issues for which a jury trial is available will be tried at a later date.

IT IS SO ORDERED.

Dated this 29th day of October, 1992.

/s/ LUTHER BOHANON
UNITED STATES DISTRICT JUDGE